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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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INDEX

	PAGE
Statement	1
Argument	4
I. The Commission's Theory By Which It Distinguishes Between And Yet Approves Both Plans II And III Commands The Decision That Leasing Of Trailers By Railroads Or Their Subsidiaries Is A Non-Common Carrier Function	5
II. The Commission Has Itself Previously Held That Trailer Leasing Is *Per Se* Not A Common-Carrier Service And Has No Proper Place In Common Carrier Tariffs	7
III. Rule 7(a) Discriminates In Favor Of Other Regulated Modes Contrary To The National Transportation Policy	9
Conclusion	13

CITATIONS

Cases

American Trucking Associations v. United States, 344 U. S. 298, 315 (1953) 9

Atchison, Topeka, and Santa Fe Railway Company, et al. v. U. S., 244 F. Supp. 955 (1965) 2

Charges For Use of Trailers, 49 M.C.C. 272 (1949) ..7, 8, 10

PAGE

Eastern Central Motor Carriers Assn., Inc. v. B. & O., et. al., 314 I.C.C. 5, *aff'd sub nom.*, Cooper-Jarrett v. U. S., 226 F. Supp. 318, *aff. per curiam*, 379 U. S. 6 (1964) 2, 6

Forwarder Volume Commodity Rates, Chicago and New York, 308 I.C.C. 455, *aff.* Eastern Express, Inc. v. U. S., 198 F. Supp. 256, *aff. per curiam* 82 S. Ct. 640 (1962) 8

Leasing and Interchange of Vehicles By Motor Carriers, 52 M.C.C. 675 (1951) 9

Pennsylvania R. Co. v. M. McGirr's Sons Co., 287 F. 334, cert. denied, 262 U. S. 743 (1933) 6

Pennsylvania Railroad Company v. P.U.C.O., 298 U. S. 170, 174-175 (1936) 6

Pennsylvania Railroad Co. v. U. S., 242 F. Supp. 890 (1965) *aff.*, Docket No. 511, October Term, 1965 7

Roush—Control—Southern California Freight Lines, 80 M.C.C. 573 (1959) 11

Substituted Service—Charges And Practices of For-Hire Carriers And Freight Forwarders, 322 I.C.C. 301 (1964) 1

Walling v. Baltimore Steam Packet Company, 144 F. 2d 130 (1944) 6

MISCELLANEOUS

C.F.R. 207.6 10

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OCTOBER TERM, 1965

No. 909

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Statement

Appellant opposes the Motions to Affirm filed by the American Trucking Associations, et al., and jointly by the United States and Interstate Commerce Commission.

Appellant's case is adequately presented in its Jurisdictional Statement. Its appeal is directed to Rule 7(a) [C.F.R. 500.7(a)] promulgated by the Interstate Commerce Commission in *Substituted Service—Charges and Practices Of For-Hire Carriers And Freight Forwarders*, 322 I.C.C.

301 (1964) (J. S. App. B, p. 196), and affirmed by the three-judge district court in *Atchison, Topeka, and Santa Fe Railway Company, et al.* v. *U. S.*, 244 F. Supp. 955 (1965) (J. S. App. A, p. 42).

Appellees here, however, are also appellants seeking reversal of the same lower court decision with respect to Rules 2 and 3 [C.F.R. 500.2 and 500.3], such appeals now pending before this Court in Dockets No. 908 and No. 924.

While this particular appeal is addressed to Rule 7(a), the decision of the lower court with respect to Rules 2 and 3 requires as well remand to the Commission for a general review of the prescribed rules as a whole. The Commission, on remand, is to have an opportunity to clarify its intent with respect to Rule 7(a), as well as Rules 2, 3 and 5 (J. S. pp. 42, 44).

Appellees in this docket would be most pleased to compartmentalize the Commission's decision and the various rules. Rules 2, 3 and 7(a), and the legal problems inherent in each, however, are inseparable.

The Commission here was clearly obsessed with providing a scheme of social security for motor carriers, i.e., wherever they were not the most efficient form of transportation, service-wise or cost-wise, they were to be given free access to the most efficient mode, in this instance, railroad TOFC, which is priced on the *cost* of operating trailers over the highway (Plan III). See *Eastern Central Motor Carriers Assn., Inc.* v. *B. & O. et al.*, 314 I.C.C. 5, *aff'd sub nom., Cooper-Jarrett* v. *U. S.*, 226 F. Supp. 318, *aff. per curiam*, 379 U. S. 6 (1964).

TOFC, however, represents a new approach both in intermodal competition and intermodal coordination. No one element stands by itself, as the lower court properly concluded. That no one element *can* stand by itself is made manifest from the Commission's own opinion, for the very

authorities cited by the Commission in differentiating between—and yet approving—both Plan II (door-to-door service including all equipment) and Plan III (ramp-to-ramp service with accessories optional to the shipper) are inescapably applicable in determining what *is* a "transportation" service performed by a railroad acting in its normal capacity in possession of a shipper's cargo and what relationship, if any, arises or obtains *before* the railroad has received any cargo from the shipper and issued a bill of lading therefor, and *after* such cargo has been released and the provisions of the tariff and bill of lading (the contract of carriage) discharged.

To restate the matter simply, the railroads originally published a series of door-to-door TOFC rates, which in general were the same as those published by the motor carriers themselves on the same commodities and between the same points. These so-called Plan II rates, reflecting the exact level then being held forth by the motor carriers themselves, were "open tariffs" in the same sense as the Commission now refers to the railroads' Plan III tariffs as "open tariffs", but for obvious reasons, the motor carriers, appellees herein, had absolutely no incentive to seek use of the railroads' Plan II rates.

When the railroads, however, in late 1958, published Plan III rates reflecting the *cost* of motor carriage over the highways, the pattern of events which gave rise to this proceeding began to emerge.

Having failed in its many efforts to secure authority from the Congress to prescribe joint rates between rail and motor carriers, the Commission shifted to the next alternative. It declared by Rules 2 and 3 that a motor carrier was no different than any private shipper and thus should be able to utilize "open tariff" railroad Plan III rates. It follows, of course, that had the railroads not chosen to make full use of their inherent advantage of lower cost for inter-city transportation, this proceeding

would never have come about. Stripped of its excess verbiage and weighed entirely upon its results, the Commission's intent to permit the motor carriers full use of the railroads' inherent advantage of lower cost on long distance intercity operations in unmistakable.

This misguided approach will be exposed in detail by railroad appellees in Dockets No. 908 and No. 924 before this Court. As the District Court has observed, however, the proceeding "... must be remanded to the Commission in any event, for a general revision of the Rules as a whole ..." and it "will have an early opportunity to clarify its intent ... with respect to Rule 7 as well."

Rule 7(a) must, by its very nature, stand hand in hand with Rules 2 and 3. If the District Court's reversal of Rules 2 and 3 is affirmed and the proceeding remanded to the Commission, a reopening of the record will permit appellant to develop, by cross-examination and other means, the loopholes by which appellees A.T.A., et al., remain wholly unregulated in the area of trailer leasing to shippers through the use of their trailer-owning subsidiaries. These latter opportunities are completely ignored in appellees' Motions to Affirm.

Argument

Appellant's argument here is threefold:

(1) That the Commission has applied one line of cases to validate the right of rail carriers to publish complete door-to-door TOFC rates and yet publish, at the same time and between the same points, lower ramp-to-ramp TOFC rates where the shipper has the option of providing the frills: trailers, drayage, and loading of cargo. Appellant agrees with these authorities, but the same citations have been ignored on the subject of trailer leasing;

(2) That the Commission itself has previously declared trailer leasing as *per se* a non-common carrier function, having no place in common carrier tariffs; and

(3) That the Commission and the lower court have, contrary to the National Transportation Policy, disregarded the *actual* discrimination created by Rule 7(a), as demonstrated by uncontradicted evidence of record.

I.

The Commission's Theory By Which It Distinguishes Between And Yet Approves Both Plans II And III Commands The Decision That Leasing Of Trailers By Railroads Or Their Subsidiaries Is A Non-Common Carrier Function.

Appellee ATA contends that appellant's definition of a non-common carrier function would permit a common carrier to decide for itself what is or is not a "transportation" function under the Act and draw its tariffs accordingly. This is sophistry. The sole distinction urged by appellant here is that the common carrier obligation of transportation does not arise until the cargo itself has been tendered into the possession of the carrier, a principle which has been clearly established in a number of leading decisions, none of which appellees touch upon here and none of which would lead to the conclusion feared by appellees. *Pennsylvania Railroad Company* v. *P.U.C.O.*, 298 U. S. 170, 174-175 (1936); *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 F. 334, cert. denied, 262 U. S. 743 (1933); *Walling* v. *Baltimore Steam Packet Company*, 144 F. 2d 130 (1944).

Pennsylvania Railroad Company v. *P.U.C.O.*, *supra*, and *Walling* v. *Baltimore Steam Packet Company*, *supra*, were, in fact, cited by the Interstate Commerce Commission in

affirming the rights of the railroads to publish, at one and the same time, Plan II TOFC door-to-door rates and lower Plan III ramp-to-ramp rates, the distinction being that:

> "... the transportation subject to regulation under the Act has been held by the Supreme Court to begin 'when merchandise has been placed in the possession of a carrier' ".

Eastern Central Motor Carriers Assn. v. *B. & O., supra*, p. 47.[1]

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[1] On March 11, 1966, Division 2, issued its decision of February 23, 1966, in *Allowances For Trucking Baled Cotton, Ark., Okla., Texas*, 326 I.C.C. 335 (1966). The 2-1 decision is noted as one of general transportation importance and is thus subject to reconsideration by the entire Commission. The matter at hand, however, concerned, among other things, the legality of the respondent railroads' practice of granting allowances for private motor carrier services to and from points not served by the railroads themselves.

The Division's discussion on this point is illuminating:

> "The parties hereto differ as to the meaning of the words 'service connected with' as contained in section 15(13). In *Walling* v. *Baltimore Steam Packet Co.*, 144 F. (2d) 130 (1944), the court at 134 stated:
>
> > The phrase 'services in connection with' is used in sections 1(3), 6(7), and 15(13) of the Interstate Commerce Act * * * and, as so used, it has uniformly been construed to mean service rendered *while a shipment is in the custody and control of the carrier or service which the carrier is legally obligated to perform.* [Emphasis added.]
>
> "This decision was cited by the Commission in *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I. C. C. 5 (1961), sustained in *Cooper-Jarrett, Inc.* v. *United States*, 226 F. Supp. 318 (W. D. Mo. 1964), affirmed per curiam, 379 U. S. 6, wherein at 47 it stated:
>
> > While section 1(3) defines "transportation" as including 'all instrumentalities and facilities of shipment or carriage, irrespective of ownership * * *, and all services in connection with the receipt, delivery * * * and handling of property transported,' and section 1(4) provides that it is the duty of a railroad 'to provide and furnish transportation upon reason-

(Footnote continued on following page)

(See similar conclusions reached in *Pennsylvania Railroad Co.* v. *U. S.*, 242 F. Supp. 890 (1965), affirmed on motion by this Court in Docket No. 511, October Term, 1965.)

II.

The Commission Has Itself Previously Held That Trailer Leasing Is *Per Se* Not A Common-Carrier Service And Has No Proper Place in Common-Carrier Tariffs.

In *Charges For Use of Trailers*, 49 M.C.C. 272 (1949), a motor carrier leased a trailer to a shipper. The shipper moved the trailer by rail and then over the highway by private carriage to its own plant at its own expense. At that point, the shipper loaded the trailer, returned it over the highway by private carriage, and thence via the railroad back to the motor carrier lessor. The motor carrier then delivered the contents of the trailer, as instructed, to points beyond the railhead. The arrangement for both the leasing and the carriage which followed upon return of the leased trailer to the motor carrier were fully set forth in that carrier's tariffs. The Commission ordered

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(Footnote continued from preceding page)

able request therefor,' the transportation subject to regulation under the act has been held by the Supreme Court to begin 'when the merchandise has been placed in the possession of the carrier.' *Pennsylvania R. Co.* v. *Ohio Utilities Comm.*, 298 U. S. 170, 174.

"Here, as indicated in appendix B, there is no requirement under the considered provisions that the cotton shipments be tendered to the respondents at the rail origin. The rail billing is obtained at the transit point after the movement has taken place. Such service cannot be reasonably construed as to take place while the shipment is in the custody, control, or possession of the carrier. Nor do we agree that under the facts of record it can reasonably be held to be a service which the carriers are legally obligated to perform." (pp. 347-348)

the carrier to remove the leasing provisions from its tariff stating that:

> "The leasing of trailers is not proper subject matter for tariff publication, and it is not made so by an attempt to connect it with the transportation service which respondent would perform beyond Providence." (49 M.C.C. at p. 275)

This unequivocal finding that trailer leasing is not a common carrier "transportation" function is wholly consistent with the distinction made by the Commission itself between shipper-furnished trailers (without any condition as to source) utilized in Plan III, and trailers furnished by the railroads themselves under their published tariffs in the use of the higher Plan II rates. In the latter case, the Commission defines Plan II trailers as "instrumentalities of transportation", but in the case of Plan III, the shipper-furnished trailers are defined as "articles of commerce", i.e., simply a larger-than-usual box provided by the shipper to protect its own cargo. *Forwarder Volume Commodity Rates, Chicago and New York,* 308 I.C.C. 455, *aff. Eastern Express, Inc.* v. *U. S.,* 198 F. Supp. 256, *aff. per curiam* 82 S. Ct. 640 (1962). Neither the Commission nor the lower court gave any recognition whatsoever to that distinction here.

The Motions to Affirm filed by ATA and the United States understandably do not undertake to explain or justify the failure of the Commission or the lower court to adhere to the same legal authorities here. The Commission's finding in *Charges For Use of Trailers, supra,* that trailer leasing was *per se* a non-common carrier function is relegated to mere mention by footnote (ATA p. 7, U. S. p. 7). In each footnote, it is simply suggested to the Court that the decision in question, while not necessarily erroneous, has, in fact, been superseded by subsequently

enacted regulations which prohibit motor carriers from any leasing of trailers whatsoever. Both appellees are well aware that such is not the case, but their sterile attempts to undercut *Charges For Use of Trailers, supra,* only emphasize the most serious part of appellant's complaint to this Court, i.e., the onerous restrictions visited upon appellant vis-a-vis the freedom of leasing which other regulated modes, particularly motor carriers, are permitted to retain.

III.

Rule 7(a) Discriminates In Favor Of Other Regulated Modes Contrary to The National Transportation Policy.

Rule 7(a) would govern leasing of equipment to any person "whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad" (J. S., p. 138). Both appellees infer, through the footnotes earlier referred to, that leasing by motor carriers is, in fact, prohibited by the regulations published at 49 C.F.R. 207.6, such regulations stemming from Commission proceedings which were subsequently upheld in *American Trucking Associations* v. *United States,* 344 U. S. 298, 315 (1953). There are, however, a number of extremely significant differences between those proceedings and the resulting rules governing motor carrier operations, on the one hand, and Rule 7(a), as sought to be enforced here.

In the first place, as recognized in *American-Trucking Associations* v. *United States, supra,* the Commission opinion there under review, *Leasing and Interchange of Vehicles By Motor Carriers,* 52 M.C.C. 675 (1951), was based upon a record of flagrant and continuing violations of the Act. This Court briefly reviewed the well-established

evidence of such violations and the evils attendant thereto at 344 U. S. 302-305, 310, 311. On the other hand, the Commission itself here admits that:

> "The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused." (J. S., p. 137)

The Commission's record here is not "almost" completely devoid of evidence of wrongdoing in trailer leasing. It is wholly devoid thereof.

Secondly, the federal regulations (C.F.R. 207.6), so briefly noted in appellees' Motions to Affirm as authority for disregarding the Commission's previous holding in *Charges For Use of Trailers, supra*, do not, in fact, produce the suggested result. C.F.R. 207.6 does deal with rental of equipment by motor carriers to private carriers and shippers, and it does prohibit motor common carriers from renting equipment to private carriers or shippers without drivers. It does *not* extend, however, to affiliates or agents of the motor carriers, but provides only that:

> "Authorized common carriers shall not rent equipment without drivers to private carriers or shippers . . .".

The record here before the Commission affirmatively shows that designated freight forwarders, and affiliates, subsidiaries, or agents of designated motor common carriers are, in fact, leasing trailers to shippers for subsequent use in railroad Plan III service. (Commissioner Webb's dissent, J. S., pp. 179-180.) It was perhaps for that reason that Rule 14 proposed by the hearing examiners to govern the matter of trailer leasing extended only to the railroads themselves and not to subsidiaries, affiliates, agents, etc. (J. S., p. 195).

That the regulated motor common carriers have made extensive use of their freedom to form subsidiary corpo-

rations, which hold ownership to the transportation property utilized by the certificated highway carrier corporation itself, is clear from a number of the Commission's own decisions. To its credit, the Commission has, upon a number of occasions, expressed the opinion that the separation of the certificated carrier from its operating equipment, etc., through the use of subsidiary corporations, is not in the public interest, but its expressions therein have apparently been so lightly regarded that the Commission itself has since decided to tacitly approve the practice. Thus, after reviewing its past policy in such matters in *Roush—Control—Southern California Freight Lines,* 80 M.C.C. 573 (1959), the Commission stated that:

> "We remain convinced that the reasoning in the above-cited case is sound. However, practical considerations, including uniform standards and treatment for all carriers, require that we give further consideration to the matters involved.
>
> "There are no provisions of the Interstate Commerce Commission Act requiring our prior approval, or which inhibit any carrier, or persons in control of a carrier, from organizing at any time, separate noncarrier corporations to which a part, or all, of the properties of the operating carrier, except interstate operating rights, may be transferred. Similarly, in the instant case, should our approval of the transaction be conditioned to require elimination of the two noncarrier companies, there would be nothing to prevent Roush or the holding company from establishing, after consummation, new terminal and equipment holding companies and transferring to them the identical properties now held by the present terminal and equipment holding companies, thus avoiding the purpose of the condition. Thus, owing to our lack of jurisdiction over the organization and activities of such noncarrier entities under common control with

carriers, our attempts to control the creation or expansion thereof when presented as a part of a section 5 transaction have been largely ineffective.

"More important, however, is the fact that the imposition of this condition in a section 5 transaction results in the creation of inequality between various carriers. Stated differently, those carriers which attempt to abide by the spirit of the prohibition against noncarrier entities (and thereby forego the tax benefits derived therefrom) are being penalized therefor since their competitors may so operate without recourse by the Commission. Obviously, we should not foster such a situation.

"In view of the foregoing, we conclude that denial of the application because of the fact that control of the noncarrier equipment and terminal holding companies is a part of the transaction, or the imposition of a condition requiring their liquidation, in either instance does not effectively accomplish a necessary or desirable result as the law now stands." (pp. 588-589)

This separation of equipment ownership from the parent motor carrier corporation creates the most obvious loophole by which motor carriers, acting through their equipment-owning subsidiaries, remain free to lease trailers to shippers for subsequent use in TOFC service at whatever charge seems convenient at the moment. There are no existing rules whatever for controlling similar practices which this record shows are today being engaged in by regulated freight forwarders.

All railroads, motor carriers, water carriers, and freight forwarders were made respondents in this case. All, however, were not given the same treatment by the Commission, even though the uncontroverted evidence of record showed that all were engaging in the same practice of trailer leasing for subsequent use in TOFC service. The Com-

mission's action with respect to Rule 7(a) is, therefore, indefensible under the terms of the National Transportation Policy, which requires the "fair and impartial regulation of all modes of transportation".

Again, referring to the dissent of Commissioner Webb (J. S., pp. 179-180), this is no "paper inequality". It is a matter of vital financial importance to this appellant, and this Court should require the Commission to review and decide the matter upon the basis of the entire record.

CONCLUSION

Appellant submits that the questions posed are of extreme public importance and require plenary consideration by this Court. The Motions to Affirm should be denied.

Respectfully submitted,

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March, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

NEW YORK CENTRAL R. CO. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 58. Decided June 12, 1967.

PER CURIAM.

The motion of American Trucking Association, Inc., et al., to be added as parties appellee is granted.

The motion to affirm is granted and those portions of the judgment of the District Court from which appellant is appealing are affirmed.